FILE COPY

Office Supreme Court, U.S.
FILED
OCT 6 1960
Clerk

Supreme Court of the United States.

October Term, 1960.

No. 396.

FRANK ARENA, Petitioner,

v.

LUCKENBACH STEAMSHIP COMPANY, INC., Respondent.

BRIEF OF RESPONDENT LUCKENBACH STEAMSHIP COMPANY, INC. IN OPPOSITION TO PETITION FOR CERTIORARI.

G. Philip Wadsworth,
Leo F. Gaffey,
50 State Street,
Boston, Massachusetts,
Attorneys for Respondent Luckenbach Steamship Company, Inc.

Table of Contents.

Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the case	2
Argument	4
I. The issues are special to the facts of this case	4
II. The issues are not of law	9
Conclusion	10

Table of Authorities Cited.

Cases.

Alaska Steamship Co., Inc., v. Petterson, 347 U.S. 396, 47 S. Ct. 601, 1954 A.M.C. 860	9
Mitchell v. Trawler Racer, Inc., 361 U.S. 808, 80 S. Ct. 926, 4 L. Ed. 2d 941	9

Statutes.

U.S. Constitution, Amendments, Art. 10	2
28 U.S.C. Secs. 1291, 1254(1), 2101(c)	2

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 396.

FRANK ARENA, PETITIONER,

v.

LUCKENBACH STEAMSHIP COMPANY, INC.,
RESPONDENT.

BRIEF OF RESPONDENT LUCKENBACH STEAMSHIP COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinions Below.

A civil action was filed in the United States District Court for the District of Massachusetts by Frank Arena, a longshoreman, alleging a count for negligence and a count for unseaworthiness against the defendant vessel owner, Luckenbach Steamship Company, Inc. Luckenbach impleaded as a third-party defendant the plaintiff's employer, American Stevedoring Corporation, the stevedoring contractor for the vessel. At the trial, at the close of the plaintiff's evidence, the defendant, Luckenbach, filed a motion for a directed verdict. The Court heard arguments by counsel and questioned counsel extensively (P.

82-96). The Court then granted the motion, stating the reasons fully (R. 82-96), and entered judgment for the defendant. The plaintiff appealed.

The Court of Appeals for the First Circuit sustained the District Court by its opinion, which appears at page 19 of the petition. Upon a petition for rehearing by the appellant, the Court of Appeals received the appellant's further brief and again affirmed the opinion previously filed by an additional opinion, which appears at page 25 of the petition.

Jurisdiction.

The complaint alleges a maritime cause of action for negligence and unseaworthiness. Jurisdiction is founded on Article 10 of the Amendments of the Constitution of the United States and Title 28 U.S.C. Sections 1291, 1254(1) and 2101(c).

Questions Presented.

The question before the Court is seemingly the same as before the District Court and the Court of Appeals for the First Circuit: whether the evidence in its aspect most favorable to the plaintiff supported a cause of action against the defendant.

Statute Involved.

There are no statutes involved in the action.

Statement of the Case.

On April 1, 1957, a gang of longshoremen employed by American Stevedoring Corporation, an independent steve-

doring contractor, were loading paper rolls from the pier into a lower hold of the SS. MATTHEW LUCKENBACH (R.A. 18). The vessel was owned by the respondent Luckenbach Steamship Company, Inc., and its entire stevedoring operations were being performed by American Stevedoring Corporation. The longshoremen were using the same method of loading the rolls of paper which had been used in the Port of Boston for many years (R.A. 24, 48). Thirty loads had been handled in the same manner on the day in question without incident prior to the occurrence of the petitioner's injury (R.A. 76).

The drafts had all been handled in the same manner as follows: Five rolls of paper, 2½ feet in diameter by 5 feet in height, were placed on their sides on a slatted wooden platform called a "cargo board"* (R.A. 57; Pl. Ex. No. 2). Three of the rolls were on the first layer and the other two were over them in the two creases (R.A. 57). The dimensions of the board were 5 feet by 8 feet (R.A. 42). At the 5-foot ends of the board were square-shaped nets (R.A. 99; Pl. Ex. No. 2). At each of the 8-foot sides were two manila ropes (four in all) used for lifting the board on the cargo hook (R.A. 62). These ropes were called "lanyards" and were on the sides of the boards (R.A. 46, 62). Before each load was lifted from the apron of the pier the two nets at the ends of the board were tied together with lines, called "board lines," and the nets were also tied to the lanyards (R.A. 62). The witness Caher referred to the lines tied between the nets as the lanyards (R.A. 78).

At the time of the petitioner's injury the load was made up on the pier in the same manner as the preceding loads (R.A. 62). Nothing unusual was observed about it when

*The boards were owned by the stevedoring contractor and stored on the pier.

it was taken up from the pier (R.A. 62). When it came up to the deck level and was moving toward the hatch, it was moving at the ordinary pace and ordinary speed (R.A. 73). It did not look different from any other load (R.A. 70). When it was near the coaming it was tipped and the rolls fell, injuring the petitioner (R.A. 69). The particular board in use was not identified. No evidence was offered that any part of the board, nets or lines broke.

Argument.

I. THE ISSUES ARE SPECIAL TO THE FACTS OF THIS CASE.

(A) The question of adequacy of evidence is necessarily special to the facts of the particular case. The "questions presented" at page 3 of the petition are framed solely in terms of the special proof in this particular case. An analysis of the petitioner's points of argument further confirms that the issues are not of general significance. With respect to the only legal issue presented—the inadequacy of the petitioner's evidence—the decision of the Court of Appeals and the District Court were clearly correct.

(B) Petitioner's first question and point of argument contends that the nets on the cargo board were not long enough. But no witness testified to that effect. In fact, no witness even mentioned the length of the nets. The very first witness called by the petitioner (St. John) testified in direct examination only that the board and nets in use were the same type which had been used for fourteen years with no evidence of prior incident.

> "The Witness: For that type paper, that was the usual procedure." (R.A. 25.)

Each of the other three witnesses who followed Mr. St. John testified only to the same effect. For the witness Hassett see R.A. 48; the witness Feeney, R.A. 57; the witness Caher, R.A. 76, 79, 81. These are the only four witnesses in the record. Mr. Caher, at page 76, testifies:

> "XQ. That is the kind of board that you always use for paper, is that correct? A. That's correct." (R.A. 76.)

The particular board in use was never identified and no comment concerning its particular condition was made in any way by any witness.

It would seem that the best proof of "reasonable fitness" of a device is successful prior use over a long period of time. Here the petitioner's witnesses not only failed to cite any deficiency in the board, but confirmed that the type of board has been used for many years with no evidence of prior incident. The effect of their testimony is to confirm the requirement of "reasonable fitness" and underscores the inadequacy of the petitioner's proof.

In part of the first point of argument in the petition, at the bottom of page 9, petitioner apparently suggests that the nets had not been tied. Yet petitioner's witness Mr. Feeney, who was the only witness who saw the load at the time it was lifted up from the pier, testified on three separate occasions in the record that the nets were tied together.

> "The Witness [Feeney]: I saw that the lanyards were tied and the board lines were on top of the load." (R.A. 62.)

> "Q. The nets were tied? A. The nets were tied." (R.A. 63.)

Any assumption that the nets were not tied would be in conflict with this express testimony in the record by the only witness who saw the load taken up from the pier.

(C) The petitioner's second question and point of argument again assumes that the nets were not tied. At page 10 of the petition the opening and basic sentence of the second point in the brief reads in part as follows:

> "Assuming without conceding that the nets . . . were not tied . . ."

The witness Feeney, called by the petitioner to describe the load at the time it was taken up, expressly testified at page 62 that—

> "The load was on the board straight, it was even, and it was tied."

He further testified at pages 62 and 63 that "the lanyards were tied" and that the "board lines were on top of the load" and that "the nets were tied."

The witness Caher, who saw the load crossing the deck, testified in considerable detail describing the way the nets were tied by four ropes and concluded by stating:

> "They were all tied? A. Yes." (R.A. 78, 79.)

Any assumption urged by the petitioner that the nets were not tied would be refuted by the petitioner's own witnesses, whose testimony is clear and emphatic on the point.

(D) The petitioner's third question and point of argument contends that the trial court should have received

evidence concerning the use of the so-called "end board" in contrast to the "side board." The trial court was more than willing to receive such evidence, but the petitioner's witnesses would not give it. In fact, the court assisted plaintiff's counsel by phrasing a question for counsel (R.A. 27). Every one of the petitioner's witnesses testified that only the board with the lanyards on the side had been used for this cargo for many years. The witness Hassett, when asked the purpose of the lanyards on the side board, replied that its purpose was "to keep the rolled paper in."

> "Q. Do you know, if you know, the purpose of this rope here which you have described as a lanyard? A. On some particular cargo like roll paper, to keep them in.
>
> "Q. To keep the rolled paper in? A. Yes.
>
> "Q. Now which type, if I have not asked you yet, which board were you using loading and discharging paper in the hold of No. 2 hatch of the MATTHEW LUCKENBACH on April 1, 1957? A. This type.
>
> "Q. This type here with the lanyard on the side? A. It is the only type they use." (R.A. 48.)

The foregoing colloquy was during the direct examination of the witness. In spite of this specific testimony from Hassett and similar testimony from the other three witnesses (St. John, 25; Feeney, 57; Caher, 76, 79, 81), the petitioner suggests that the record on the point is "far from clear," although conceding "there was some proof that it was customary to use the side board." In fact, the proof to that effect was uniform from every one of petitioner's witnesses (R.A. 25, 48, 57, 76).

The evidence concerning custom was not offered by respondent Luckenbach in justification; it was offered

by the petitioner. It represented an apparent attempt by the petitioner to show through witnesses a departure from custom by the board in use. But instead the witnesses testified that the board in actual use was the normal and customary one and had been for many years. None of the witnesses testified to any prior incident or difficulty in the use of the side board during its many years of use.

(E) The petitioner's fourth question and point of argument contends that the ship's officers should have requested the stevedoring contractor to use a different board from that which the stevedoring contractor had been using without incident for many years. Such a proposal answers itself. No evidence was produced in the trial of any deficiency in the equipment and the ship's officers were equally justified in accepting the continued use of a proved procedure provided by the stevedoring contractor.

(F) The petitioner's fifth question and point of argument would emphasize the legal principles concerning adequacy of proof. These principles were unhesitatingly recognized by the Court of Appeals and the District Court, and are fully concurred in by the respondent. But legal principles are not a substitute for evidence. No evidence was offered from any witness of any deficiency in the particular board or in the type of board. Evidence was offered only that the same type of board had been used for many years and no evidence was offered of any prior incident. The Court of Appeals and the District Court necessarily reached the conclusion that the petitioner's evidence did not support a cause of action against the respondent.

II. The issues are not of law.

(A) All of the principles of law which the petitioner urges are fundamental ones. These principles are fully adopted in the opinions of the Court of Appeals and the District Court. These principles may be simply expressed as follows:

(1) That the warranty of seaworthiness applies to equipment brought on board the vessel by the stevedore.

Alaska Steamship Co., Inc., v. *Petterson* (1954), 347 U.S. 396, 47 S. Ct. 601, 1954 A.M.C. 860.

(2) That unseaworthiness created by the stevedore is nonetheless a breach of warranty of seaworthiness.

Alaska Steamship Co., Inc., v. *Petterson* (1954), 347 U.S. 396, 47 S. Ct. 601, 1954 A.M.C. 860.

(3) That the test for breach of warranty of seaworthiness is "reasonable fitness" of the equipment for its intended use.

Mitchell v. *Trawler Racer, Inc.* (1960), 361 U.S. 808, 80 S. Ct. 926, 4 L. Ed. 2d 941.

These are the only points of law which are cited by the petitioner. They are well defined in a number of existing decisions of this Honorable Court and have been recently reaffirmed in a clear and thorough manner.

Mitchell v. *Trawler Racer, Inc.* (1960), 361 U.S. 808, 80 S. Ct. 926, 4 L. Ed. 2d 941.

Only the facts of the present case are new, but that is true of every case. The Court of Appeals after two con-

siderations and the District Court, after hearing witnesses and arguments of counsel conscientiously examined the facts of the present case in the light of the well-established principles to which the petitioner refers. Both courts have adopted these principles of law and have reached the conclusion that the petitioner failed to provide the necessary proof to support a cause of action against the respondent. No new issues of law are presented by the record. There is no conflict between the present case and opinions of this Honorable Court, or opinions in other circuits or opinions in any State Supreme Court. The opinions of the Court of Appeals and the District Court are in complete conformity with well-established judicial decisions of this Honorable Court, other Courts of Appeal and other District Courts of the United States.

Conclusion.

The respondent respectfully submits that the petition should not be granted.

G. PHILIP WARDNER,
LEO F. GLYNN,
50 State Street,
Boston, Massachusetts,
Attorneys for Respondent
LUCKENBACH STEAMSHIP
COMPANY, INC.